NO. 21286

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACK FINEBERG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

STATEMENT OF PLEADINGS DISCLOSING JURISDICTION

Appellant Jack Fineberg appeals from his conviction on eighteen counts of a twenty-count indictment charging him with violations of Title 18, United States Code, Section 1341 [Mail Fraud], Section 1342 [Use of a Fictitious Name to Defraud], and Section 1343 [Wire Fraud]. Appellant was charged with co-defendant Nelson Bureau of Employment, a corporation doing business as Merco Sales, against whom the Government dismissed its case subsequent to Appellant's trial.

All of the counts of the indictment relate to a scheme to

defraud various record distributing firms. The scheme is alleged in Count One of the indictment [C. T. p. 2]. 1/ That count charges Appellant with having devised a plan whereby he would use Merco Sales Corporation to place orders with record distributing firms for shipments of phonograph records. It is charged that misleading mailings fraudulently represented that Merco Sales was a well-established business firm. It is further alleged that after accepting and retaining merchandise from the record distributors, Appellant did not remit full payment and that he did not intend to remit full payment. It is stated that Appellant resold the merchandise that he purchased from the distributors in amounts from 10 to 20 percent below cost, thus forcing Merco Sales into a state of bankruptcy, preventing full payment to the distributors as impliedly promised under usual business practice. Finally, the scheme charges that Appellant lulled the distributors into a false sense of security by various fraudulent acts [C. T. p. 4].

The indictment was filed on January 10, 1966 [C. T. p. 2].

Jury trial commenced before the Honorable Francis C. Whelan, United States District Judge on June 13, 1966 [R. T. p. 85]. 2/

On June 27, 1966, Appellant was found guilty by the jury on Counts One, Two, Three, Four, Five, Six, Seven, Eight and Nine [Mail Fraud]; Counts Ten, Eleven, Twelve, Thirteen and

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1/ "C. T." refers to Clerk's Transcript.

2/ "R. T." refers to Reporter's Transcript.

Fourteen [Use of a Fictitious Name to Defraud]; and Counts Seventeen, Eighteen, Nineteen and Twenty [Wire Fraud] [C. T. p. 87]. Appellant was found not Guilty as to Counts Fifteen and Sixteen [C. T. p. 74].

On July 21, 1966, Judge Whelan sentenced Appellant to a term of imprisonment totalling four years, fines totalling $5,000 and a period of five years probation after service of the four year term of imprisonment.

The United States District Court for the Southern District of California had jurisdiction of this case based upon Title 18, United States Code, Sections 1341, 1342, 1343, and 3231. The jurisdiction of this Court rests upon Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Title 18, United States Code, Section 1341 provides as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin,

obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any Post Office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years or both."

Title 18, United States Code, Section 1342 provides as follows:

"Whoever, for the purpose of conducting, promoting, or carrying on by means of the Post Office Department of the United States, any scheme or device mentioned in Section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of

mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

Title 18, United States Code, Section 1343 provides as follows:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in inter-state or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

III

STATEMENT OF THE CASE

A. Questions Presented.

1. Were certain of the Government's exhibits which consisted of business records of Merco Sales, a corporation, improperly admitted into evidence and was the admission of such evidence a violation of Appellant's Fifth Amendment privilege against self-incrimination?

2. Was evidence concerning a prior, similar scheme to defraud, conducted by Appellant, improperly admitted into evidence?

3. Did the Court improperly exclude expert testimony proffered by Appellant concerning the feasibility of Appellant's business plan?

B. Statement of Facts.

Count One of the indictment charges Appellant with devising a scheme to defraud Record Distributing firms located throughout the United States by means of false and fraudulent pretenses, representations, and promises [C. T. p. 2]. It is charged that Appellant accomplished this scheme in the following manner:

(1) By causing to be filed with the State of California

a Certificate of Corporation on behalf of Nelson Bureau of Employment for transaction of business under the fictitious name Merco Sales [C. T. pp. 2-3];

(2) By placing orders with the record distributing firms here involved, which orders were designed falsely to represent that Merco Sales was a well established business firm [C. T. p. 3];

(3) By Appellant's use of assumed names, including George Evans and Jack Fine, in orders and correspondence directed to the record distributors [R. T. p. 3];

(4) By causing the distributors to ship merchandise to Appellant as a result of orders placed with the distributors by Appellant [R. T. p. 3];

(5) By accepting and retaining the merchandise shipped to him for which he never intended to remit full payment and did not make full payment [C. T. p. 3];

(6) By falsely representing in orders, correspondence, and communications with the record distributors that full payment would be made in accordance with usual business practice [C. T. p. 3];

(7) By reselling the merchandise he had purchased from the record distributors in amounts from 10 to 20 percent below cost, thus forcing Merco Sales into a state of Bankruptcy and preventing full payment to the distributors [C. T. p. 4];

(8) By lulling the distributors into a false sense of security so as to prevent them from complaining by:

(a) Making partial payments for merchandise;

(b) Creating the false inference that Appellant was conducting a flourishing and profitable business;

(c) Entering into agreements with the distributors to make payments for past merchandise and transmitting post-dated checks so that Appellant could continue to order merchandise from the distributors [C. T. p. 4].

It is alleged in the Counts here involved that the mails, Post Office Department, and Interstate wire facilities were used to expedite and further the scheme [C. T. pp. 4-24].

Appellant does not question the sufficiency of the evidence. Briefly, the following evidence was adduced at trial to support the Government's case:

John F. O'Brien, a wholesale record distributor, and an officer of the John O'Brien Distributing Company and Volume Record Sales [R. T. pp. 176-177] testified that the John O'Brien Company received a letter dated September 9, 1963 [Plaintiff's Exhibit 123] bearing the signature of George Evans [R. T. p. 180]. That letter read substantially as follows:

"Dear Sir:

"We are large buyers of LP records. Enclosed please find our first order. Please give us your lowest price, as these are the type of orders we would buy several times a month.

"Let us hear from you as soon as possible. We pay all freight charges and all sales are final.

"If there are any questions please call us collect.

"Thanking you in advance, I remain

"Respectfully yours,

"Merco Sales.

"(Signed) George Evans."

Four or five days later, O'Brien telephoned Evans in Los Angeles [R. T. p. 180]. During that conversation the person purporting to be Evans stated to O'Brien that he desired to buy phonograph records from O'Brien because O'Brien carried a large number of labels [R. T. p. 187]. O'Brien stated to Evans that he could not sell records cheaper than California distributors, and that since the O'Brien Company was located in Wisconsin, some two-thousand miles away, eight or nine cents would be added to the cost of each record by reason of the cost of air transportation [R. T. p. 186]. O'Brien further testified that Merco Sales commenced purchasing records in September, 1963, and continued to do so in September and October, 1963 [R. T. p. 190]. During this period of time, payments were timely, but became slower in November and December [R. T. p. 190].

Later, O'Brien began to receive post-dated checks from Merco, although there had been no agreement that Merco would issue post-dated checks. When deposited, many of these checks were returned because there was not sufficient funds in Merco's account to cover them [R. T. p. 191]. One such check was sent

with a note signed by "Jack" and requested Mr. O'Brien to deposit that check on June 23rd [R. T. pp. 192-193]. O'Brien held three post-dated checks [Plaintiff's Exhibits 126, 488, 489]. During the period of time that these checks were held, O'Brien at Appellant's request shipped further merchandise to Merco [R. T. p. 195]. After deposit, these checks were returned because of non-sufficient funds [R. T. p. 196].

O'Brien telephoned Merco Sales after these checks were returned unpaid and a person who identified himself as Jack Fine [R. T. p. 196] stated that O'Brien would be paid what he was owed [R. T. p. 197]. Mr. O'Brien's companies were not paid, and suffered a loss of $79,855.72 [R. T. p. 198].

In January, 1964, O'Brien came to Los Angeles, and stayed at the Beverly Hills Hotel [R. T. p. 184]. While there, he received a telephone call from a man identifying himself as George Evans, who stated that he was down in the lobby of the hotel [R. T. p. 183]. Shortly thereafter, Appellant Fineberg came to O'Brien's room and identified himself as Jack Fine [R. T. p. 184]. O'Brien recognized Appellant's voice as that of the person with whom he had previously conversed and who had identified himself as George Evans [R. T. pp. 184-185].

During the same period of time, Appellant Fineberg was dealing with Carl Glaser, who operated Metro Record Distributing Corporation and Disceries, Incorporated, of Buffalo, New York. Glaser was contacted by "George Evans" in September, 1963 [R. T. pp. 284-285]. Arrangements were made to ship phonograph records

to Merco upon the following terms: Half of the amount of the payment at time of shipment, the remainder of payment at the time of receipt of the second shipment [R. T. p. 286]. During the first three or four shipments, payments were timely, but later on payments became slow [R. T. p. 288]. In March, 1964, Glaser began to receive post-dated checks along with requests for additional phonograph records [R. T. p. 288]. Certain of these checks were returned unpaid [R. T. p. 290], resulting in a loss to Merco of $4,340.00 and to Disceries in the sum of $2,960.00 [R. T. p. 291].

Louis Lavinthal, operator of West Coast Record Distributors of Bellevue, Washington [R. T. p. 325], was similarly contacted by George Evans in July, 1963. Evans stated he desired to purchase records from Lavinthal so that he could sell them to chain or discount stores on the eastern seaboard. Evans also told Lavinthal that he preferred purchasing records from Lavinthal because Lavinthal carried many labels, and this method of purchasing would obviate the necessity of purchasing from eight or ten distributors [R. T. pp. 327-328].

Arrangements were made to ship records with half payment to be made at the time of order and the balance to be paid C. O. D. [R. T. p. 331]. In September, 1963, at Evans request, the method of payment was modified so that half payment would be made at the time of ordering, but the remaining half could be paid after receipt of the records [R. T. p. 334].

In June, 1964, Appellant Fineberg visited Mr. Lavinthal in

Seattle, Washington. At that time, Appellant owed $15,000 - $17,000, and requested a different method of payment [R. T. p. 338].

Checks made payable to Lavinthal's companies began to be returned for insufficient funds [R. T. p. 339]. Lavinthal's losses as a result of doing business with Merco amounted to $44,457.03 [R. T. p. 340].

Arthur Freeman, who was associated with the Benart and Concord Distributing Companies of Cleveland, Ohio [R. T. pp. 394-395] was contacted by George Evans, and began to sell records to Merco [R. T. p. 402]. Later, Freeman was pressured by Merco for more lenient terms [R. T. p. 403]. Payments became slower [R. T. p. 406], balances were increasing [R. T. p. 407] and a stop payment check was received [R. T. pp. 408-409], resulting in a loss of $10,359.60 [R. T. p. 409].

Similarly, John Cohen, owner of Seaway Distributors Incorporated of Chagrin Falls, Ohio [R. T. p. 423] lost $9,511.00 as a result of sales to Merco [R. T. p. 434].

Gerber Distributing Company lost approximately $23,000.00 [R. T. p. 451]. According to William W. Gerber of Syracuse, New York [R. T. p. 444], he was first contacted by letter from Merco [R. T. p. 445]. Telephone calls with George Evans followed in July, 1963 [R. T. p. 445]. Merco began to purchase records, and balances increased [R. T. p. 448]. Bounced checks followed [R. T. p. 449].

Harvey L. Korman of Great Lakes Distributing Company

and Buckeye National Sales Corporation in Cleveland, Ohio [R. T. pp. 474-475] lost $65, 290. 50 [R. T. p. 448] as a result of sales to Merco, insufficient fund checks and non-payment [R. T. pp. 474-492].

Hereinbelow is set forth the cost to Appellant of the records sold to him by the above-mentioned distributors:

Chart No. 1

RECORD DISTRIBUTOR	COST TO APPELLANT			LOSS SUSTAINED BY DISTRIBUTOR	REPORTER'S TRANSCRIPT REFERENCE
	$3.98	$4.98	$5.98		
John F. O'Brien John O'Brien Dist. Volume Record Sales	1.60-1.85	2.35-2.50	2.50-3.00	$79,000	(200-204) (280)
Carl Glasser Metro Record Dist. Corp. Disceries Inc.	1.70-1.87	2.24-2.50		7,300	(285-293) (291)
Louis Lavinthal West Coast Record Dist. C & C Dist. Northwest Record Center	1.78-1.89	2.06-2.86	2.47-3.15	44,457.03	(341) (340)
Arthur Freeman Benart Dist. Co. Concord Dist. Co.	1.78-1.89 1.69 (one time only)	2.22-2.37	2.50	10,359.60	(419) (409)
John B. Cohen Seaway Distributors Inc.	1.75-1.99			9,511	(435) (434)
Wm. W. Gerber, Jr. Gerber Dist.	1.75-1.89	2.18-2.30		23,000	(451) (451)
Harvey L. Korman Great Lakes Dist.	1.75-1.98	2.25-2.49	2.88-2.99	65,290.50	(490) (488)

Appellant Fineberg sold phonograph records to other record distributors at the following prices:

Chart No. 2

APPELLANT'S SALES OUTLETS	APPELLANT'S SALES PRICE			TOTAL PURCHASES FROM APPELLANT	REPORTER'S TRANSCRIPT REFERENCE
	$3.98	$4.98	$5.98		
George D. Hartstone Hart Distributors Cal Racks, Inc.	1.62-1.65	2.02	2.25	$105,000	(551-558) (547)
Richard S. Baum B & R Record Distributors B & G Music Shop	1.40-1.65	1.80-2.00	2.30-2.50	145,000	(633) (645)
William E. Cohan National Trade	1.521/2- 1.621/2	1.75- 1.971/2	1.971/2	250,000	(674) (677)
Charles O. Simms White Front Stores	1.60-1.70	2.00-2.10	2.40-2.50 (Less 5¢ commission on each record thru Haskell Faher)		(701)
Sam Ricklin in the record business	(10¢ to 20¢ approximately lower than could be bought from regular distributors)				

The phonograph records purchased by Appellant as reflected in Chart No. 1 were the same records which Appellant sold to other distributors as set forth in Chart No. 2 [R. T. pp. 547-564; 1174-1194].

Thus, it can be seen that in no instance did Appellant sell the records that he purchased for profit. Even Appellant Fineberg at trial could not cite one instance when he sold records for a profit.

Two purchasers of Appellant, George D. Hartstone and William E. Cohan observed evidence that the phonograph records purchased by them originally came from the victimized distributors [R. T. pp. 625-673], even though Appellant took great care to instruct his employees to remove any such labeling from record cartons [R. T. pp. 668-670; 779-781].

The Government presented evidence with respect to Appellant's involvement in a prior similar scheme to defraud during the year 1962 in Albuquerque, New Mexico. In this scheme, Appellant operated the M. & C. Sales Corporation and used the assumed name, Jack Ross [R. T. p. 794]. Thomas E. Heald, who operated the Heald Supply Company testified that he did business with the M. & C. Corporation from April through August 1962, and Appellant was identified as the individual whom Heald knew to be Jack Ross, Manager and owner of the M. & C. Corporation [R. T. pp. 813-814]. Heald was first contacted by telephone and letter [R. T. p. 815]. Ross requested merchandise on an open line basis, but since credit information was not available, payment

was to be made on a C. O. D. arrangement with the understanding that if Appellant's bills were paid monthly, Heald would attempt to establish a line of credit for Ross [R. T. p. 816].

The picture is clear: The Government proved that Appellant Fineberg sold merchandise at consistently lower prices than that for which he was purchasing said merchandise.

Under these circumstances, Appellant could not expect to make full payment to his creditors. Indeed he never intended to make full payment for his purchases. Appellant succeeded in defrauding creditors of more than $230,000.00, just as he defrauded others through the purchase and sale of identical merchandise through the operation of M. & C. Sales Corporation. Simply stated, Appellant purchased phonograph records and "dumped" these very records on the market as quickly as he could for whatever possible price Appellant could most easily obtain with the intent never to pay the distributors for said merchandise.

IV

ARGUMENT

A. EXHIBITS OF THE GOVERNMENT CONSISTING OF BUSINESS RECORDS OF THE CORPORATION, MERCO SALES, WERE PROPERLY ADMITTED IN EVIDENCE; THE FIFTH AMENDMENT PRIVILEGE AGAINST INCRIMINATION MAY NOT BE CLAIMED BY A CORPORATION.

Apparently, it is contended that Appellant's Fifth Amendment privilege was violated in that he was required to produce to the grand jury the business documents of Nelson Bureau of Employment, a corporation doing business as Merco Sales. Appellant suggests that the Fifth Amendment privilege should be applied to persons who conduct business operations through small corporations [See Appellant's opening brief, p. 63]. However, the law runs contrary to this contention. Although one is protected by the self-incrimination privilege of the Fifth Amendment against the compulsory production of his private books and papers, this privilege does not extend to the books of the corporation which are in his possession. Furthermore, physical custody of incriminating documents does not protect the custodian against their compulsory production. See Wilson v. United States, 221 U. S. 361 (1911). In Wilson the Supreme Court had occasion to consider this rule as it relates to private corporations, and the Court said:

> "What then is the status of the books and papers of a corporation, which has not been created

as a mere instrumentality of government, but has been formed pursuant to voluntary agreement and hence is called a private corporation? They are not public records in the sense that they relate to public transactions, or, in the absence of particular requirements, are open to general inspection or must be kept or filed in a special manner. They have reference to business transacted for the benefit of the group of individuals whose association has the advantage of corporate organization. But the corporate form of business activity, with its chartered privileges, raises a distinction when the authority of government demands the examination of books. That demand, expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It cannot resist production upon the ground of self-incrimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law and to inflict punishment by forfeiture of franchises or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably made. . . ."

Appellant cites the dissenting opinion in Wilde v. Brewer, 329 F. 2d

924 (9th Cir. 1964) in support of his contention. However, the majority opinion relies upon Wilson v. United States, supra, and the similar holding of the United States Supreme Court in Grant v. United States, 227 U.S. 74 (1912).

Appellant also suggests that the case of Wilde v. United States, 362 F.2d 206 (9th Cir. 1966) also gives support to his cause. However, that case deals with the enforcement of an Internal Revenue summons under 26 United States Code, Section 7206, and merely holds that before such a summons will be enforced, it must be shown that the Internal Revenue investigation is being conducted for a legitimate purpose. Even that case holds that the fact that evidence might be gathered for a criminal prosecution would not render the summons unenforceable if it were shown that other legitimate purposes for the investigation existed. Clearly, the law does not give to Appellant Fineberg the privilege to withhold from the grand jury the documents of Merco Sales, a corporation.

It is further contended that the corporate documents in question were obtained by the Government through threats, coercion and duress [see appellant's opening brief, pp. 60-61]. We must first commence with the assumption that the Grand Jury had a right to subpoena and obtain the corporate records in question pursuant to the above cited case authorities. It should be further noted that the same contention now made was raised at the District Court level [C. T. pp. 27-47]. In an affidavit filed by Appellant with the Court in connection with a Motion for the Suppression

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of Evidence [C. T. pp. 27-47]. Mr. Fineberg suggested that he was a commission man associated with the Nelson Bureau of Employment and had no title or position of significance with that corporation [C. T. p. 45]. Thus, though the dissenting opinion in Wilde v. Brewer is not the law of this circuit, it would appear that appellant has taken himself out of the special circumstances described by Judge Madden in his opinion wherein it was contended in the Wilde case that the sole owner of the corporation should be entitled to claim the Fifth Amendment privilege. Appellant has not made a claim that he was so closely associated with Merco Sales so as to fall within the exception that Judge Madden would have had the court accept as the law.

With respect to the allegations and suggestions that Government counsel acted improperly during Grand Jury proceedings in obtaining the corporate documents involved, it should be noted that Counsel for the Government produced the pertinent Grand Jury minutes for an in camera inspection by the court on March 14, 1966 [R. T. p. 33]. Thereafter, on March 23, 1966, having had the opportunity of reviewing this Grand Jury testimony, the Court denied Appellant's motion to suppress the business documents [R. T. p. 36].

Clearly, there is no merit to Appellant's challenge as to the admissibility in evidence of these corporate business documents on any legal ground.

B. EVIDENCE OF A PRIOR SIMILAR SCHEME TO DEFRAUD OTHER RECORD DISTRIBUTORS WAS PROPERLY ADMITTED AS BEARING ON THE ISSUE OF APPELLANT'S INTENT.

The Government presented evidence with respect to Appellant's involvement in a prior similar scheme to defraud during the year 1962 in Albuquerque, New Mexico. In this scheme, Appellant operated the M. & C. Sales Corporation and used the assumed name Jack Ross [R. T. p. 794]. Thomas E. Heald, who operated the Heald Supply Company testified that he did business with the M. & C. Corporation from April through August 1962, and Appellant was identified as the individual whom Heald knew to be Jack Ross, Manager and owner of the M. & C. Corporation [R. T. pp. 813-814]. Heald was contacted by telephone and letter [R. T. p. 815]. Ross requested merchandise on an open line basis, but since credit information was not available, payment was to be made on a C. O. D. arrangement with the understanding that if Appellant's bills were paid promptly, Heald would attempt to open a line of credit [R. T. p. 816].

Phonograph records were shipped to M. & C. Sales Corporation by Heald from between July 10, 1962 and August 22, 1962 [R. T. p. 818]. After receiving a financial statement concerning the M. & C. Sales Corporation, a line of credit was allowed by Heald [R. T. p. 818]. In mid-August, 1962, Heald received two post-dated checks from the M. & C. Sales

Corporation, after which large orders of records were shipped to M. & C. [R. T. p. 819]. As a result of post-dated checks being returned to Heald Supply Company by reason of non-sufficient funds, that company suffered a loss of $56,783.00 [R. T. pp. 821-822]. Records were purchased by Appellant from Heald as follows: 2.08 for $3.98 retail records; 2.59 for $4.98 retail records; and 3.24 for $5.98 retail records [R. T. p. 823]. Heald further testified that he did not ship the last large orders to M. & C. Sales Corporation until the aforementioned post-dated checks had been received [R. T. p. 837].

Ivan B. Conwell, owner of the Conwell Distributing Company of El Paso, Texas, also did business with M. & C. Sales Corporation in 1962 [R. T. pp. 480-481]. Conwell, too, identified Appellant Fineberg as the individual with whom he did business and whom he knew as Jack Ross [R. T. p. 841]. After meeting and talking with Appellant, two shipments of phonograph records were sent to M. & C. Sales Corporation valued at $9,900. Payment was never received by Conwell [R. T. p. 843], although the agreement between Conwell and Appellant had been for payment to be made within ten days from the date of shipment of phonograph records [R. T. p. 848].

Robert L. Tripp, President of the Albuquerque National Bank, testified that he met Appellant several weeks prior to April 6, 1962 [R. T. pp. 853-854] and that Appellant identified himself as Jack Ross. At that time Mr. Fineberg opened a commercial checking account at the bank in the name of M. & C. Sales

Corporation. Mr. Tripp testified that Appellant placed the signature of Jack Ross on a signature card from M. & C. Sales Corporation [R. T. p. 857].

Mary Joe Morse was employed by Appellant as a bookkeeper in the M. & C. Sales Corporation from May through August, 1962. She also knew Appellant as Jack Ross [R. T. pp. 874-875]. Morse recalls typing labels for B. & R. Record Company, in New York City [R. T. p. 879] as well as peeling labels and removing all printed matter from record cartons so that no point of origin would be shown on the cartons [R. T. p. 879]. Mrs. Morse also recalls that Appellant used the names Jack Ross and Paul Hager in telephone conversations while Appellant was requesting credit of negotiating for the purchase of records [R. T. p. 881]. Appellant directed her to prepare post-dated checks made payable to Heald Supply Company [R. T. p. 885]. At the end of August, 1962, Appellant told Mrs. Morse that he would be away for two or three days. Mrs. Morse did not again see Appellant until she testified in the District Court at trial.

Ellison C. Driggers also knew Appellant as Jack Ross. Mr. Driggers leased property to M. & C. Sales Corporation from April through August, 1962. According to Driggers, Appellant vacated the property without notice [R. T. pp. 911-914].

As the trial court noted, the above-mentioned evidence pertaining to Appellant's operation of the M. & C. Sales Corporation was offered by the Government as bearing on the issue of intent [R. T. pp. 920-921].

There is no question but that there exists a general rule that evidence of a defendant's previous misconduct or other criminal acts is inadmissible. In Stewart v. United States, 311 F. 2d 109, 112 (9th Cir. 1962), the Court quoted with approval, the exception to this general rule as set out in Bracy v. United States, 79 U.S. App. D.C. 23, 142 F.2d 87, 88:

> "However, there are many well established exceptions to this rule, raised by the special circumstances of particular cases; to the end that all relevant facts and circumstances tending to establish any of the constituent elements of the crime of which the defendant is accused may be made to appear. Thus, evidence of other criminal acts has been held admissible by this court when they are so blended or connected with the one on trial as that proof of one incidentally involves the other; or explains the circumstances thereof, or tends logically to prove any element of the crime charged. Such evidence is admissible if it is so related to or connected with the crime charged as to establish a common scheme or purpose so associated that proof of one tends to prove the other, or if both are connected with a single purpose and in pursuance of a single object; as well as to establish identity, guilty knowledge, intent and motive."

As this Circuit stated in Fernandez v. United States, 329 F. 2d 899, 908 (9th Cir. 1964), this type of relevant evidence which tends to prove a general fact in the case is admissible even though the evidence shows that the accused committed another offense at a different time and place. See O'Dell v. United States, 251 F. 2d 704, 707 (10th Cir. 1958); 7 Wigmore On Evidence, 3rd Edition, §216, pp. 712-718. See also the recent Ninth Circuit case approving Fernandez and Stewart: Head v. United States, 346 F. 2d 194 (9th Cir. 1965). It should be noted that the Government has done far more in the instant case in showing a substantially similar scheme to defraud then what was offered and approved by this Court in Fernandez, supra.

C. THE EXPERT TESTIMONY PROFFERED BY APPELLANT WAS PROPERLY EXCLUDED AS BEING CONFUSING, OF LITTLE POTENTIAL HELP TO THE JURY AND NOT RELATED TO A SUBJECT BEYOND COMMON EXPERIENCE SO AS TO REQUIRE EXPERT TESTIMONY.

Appellant Fineberg in testifying in his own behalf, stated that had he been given free merchandise, proper credit terms and extensions of extra discounts as were accorded to other large distributors, that he would have succeeded in conducting a successful business [R. T. p. 1111]. This was Appellant's contention although the evidence was overwhelming to the effect that Appellant had not been promised free merchandise or other credit terms,

than those agreed upon by Appellant and victimized distributors and, of course, Appellant did not during his direct or cross-examination, show one transaction wherein he had sold phonograph records for more than he had purchased them. To support the proposition that notwithstanding this unique approach to business development, Appellant would some day show profits as a result of his newest business venture, Merco Sales. Joseph Segal, a certified public accountant, was called as an expert witness on behalf of the defense [R. T. p. 1016].

Segal was offered as a witness to prove that it would be possible for a distributor of records to sell at a loss for a period of time and still expect to succeed in business by taking advantage of special terms of payment and credit which would be allowed a volume buyer [R. T. p. 1067]. This optomistic result would be dependent upon Appellant's testimony regarding his receipt of free records and greater discounts [R. T. pp. 1102-1105].

There was, however, no evidence which would support the theory that Appellant was to receive such advantageous purchasing arrangements. Rather, testimony was clear that each victimized distributor had very definite payment arrangements with Appellant, settled upon by agreement with Appellant during his initial contacts with the distributors [R. T. p. 180].

The opinion of a witness qualified as an expert is admissible into evidence whenever the jury, on the basis of its common knowledge and common understanding, is unable to bridge the gap of causal relation between the facts before it and the conclusions

to be drawn, without the technical assistance of one with special experience or education in the particular field. Francis v. Southern Pacific Co., 162 F. 2d 813, 817 (10th Cir. 1947). Where, on the other hand, the matter at issue is the subject of common knowledge, even though there may be experts in the field, their testimony is not admissible. Schmieder v. Barney, 113 U. S. 645, 648; Salem v. United States Lines Co., 370 U. S. 31, 35; Coca Cola Co. v. Joseph C. Wirthman Drug Co., 48 F. 2d 743, 746 (C. A. 8, 1931); Francis v. Southern Pacific Co., supra; Henkel v. Varner, 138 F. 2d 934, 935 (C. A. D. C. 1943); Riley v. United States, 225 F. 2d 558, 559 (C. A. D. C. 1955).

In Schmeider, the Supreme Court over seventy-five years ago said in upholding the exclusion of testimony by mercantile experts on the question of whether one type of merchandise was "goods of similar description" to another type of merchandise:

> "The effort was to put the opinion of commercial experts in the place of that of the jury upon a question which was as well understood by the community at large as by merchants and importers. This it was decided in Greenleaf v. Goodrich could not be done. . . ." (Emphasis added).

In Salem, the Supreme Court recently reiterated that expert testimony is properly excluded:

> "[I]f all the primary facts can be accurately and intelligibly described to the jury, and if they,

as men of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience, or observation in respect to the subject under investigation. . . ." (Emphasis added).

In Coca-Cola Co., plaintiff sought to offer expert testimony that, based upon analysis, defendant's soda had a different percentage of ingredients than did plaintiff's and hence was spurious. The percentage of the different ingredients in defendant's soda was given, and it was stated whether each percentage was higher or lower than in plaintiff's. The percentage of ingredients in plaintiff's soda was withheld, however. The Eighth Circuit upheld the rejection of this testimony, saying:

> "If the differences or similarities are such that an ordinary man may observe, there is no reason why the trier of fact should not make the comparison, and, independently therefrom, reach the conclusion . . . . Where all the facts upon which a determination is based can be placed before the trier of fact and proper deduction of the determination therefrom does not require special training to adequately understand the significance of the facts, the determination thus made is a 'conclusion' within the meaning of the rules of

evidence, and as such, is not admissible. The vice of such evidence is accentuated where such conclusion is of an ultimate fact to be determined by the trier of fact." (Emphasis added).

Finally, in Francis, the Tenth Circuit said:

"The opinion of a witness qualifying as an expert is not admissible in evidence where the question for determination by the jury depends entirely on common knowledge and common understanding, and no special training or experience is required for its correct decision. In a case of that kind the jury is equally competent with the expert to weigh and appraise the evidence and to draw conclusions from it, and therefore expert testimony should be excluded." (Emphasis added).

Expert opinions which are unsupported by fact can only represent personal, unsubstantiated value judgments which have no standing as evidence. Atlantic Life Insurance Co. v. Vaughn, 71 F. 2d 395, 39 (C. A. 6, 1934). Such opinions do not constitute a step on the road to truth for they are not probative of anything except the personal feelings of the witness. If characterization or value judgments are to be made, the jury has both the ability and the duty to make them. Coca Cola Co. v. Joseph C. Wirthman Drug Co., supra. In short, then, an expert opinion is not admissible

in evidence when its factual foundation is nebulous. United States v. American Tobacco Co., 39 F. Supp. 957 (E. D. Ky. 1941).

Mr. Segal's proffered testimony was based upon facts not pertinent to this case. His belief that it would be possible for one to show profit was based upon the assumption that Appellant would be able to take advantage of liberal discounts and one-hundred percent return privileges [R. T. pp. 1039-1040]. Such facts did not exist here and, therefore, the admission of such testimony would have been confusing, and misleading to the jury.

V

CONCLUSION

For the reasons stated the Judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Stephen D. Miller
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